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ARIZONA ATTORNEY GENERAL

5 November 1945

Police  
Retirement

Mr. Thomas J. Elliott  
City Attorney, City of Tucson  
615 Valley National Building  
Tucson, Arizona

Dear Sir:

This is in reply to your letter of 27 October 1945, in which you requested our opinion on the following question:

"Will members of the Tucson Police Department on military leave of absence be entitled to credit time in the service of the United States as actual police service in computing aggregate years of police service necessary for retirement and pension?"

You also submitted to us a copy of your opinion of the same date, addressed to Carl M. Hitt, Secretary of the Police Pension Board of the City of Tucson, in which you answered the identical question in the negative. Your conclusion was based entirely on the construction of the Police Pension Act of 1937 which is found in Chapter 16, Article 18, of the Arizona Code, 1939. If the Act itself were the only criterion to determine the question, we would agree with you.

We believe, however, that the Police Pension Act should be construed liberally in connection with Section 308 of the Federal Selective Training and Service Act of 1940 (Title 50, U. S. Code Annotated), and with the State Act (Chapter 29, 2nd Special Session Laws of 1944), both of which acts you might have overlooked.

We shall now cite a part of the provisions of Section 308 of the Selective Service Act which pertains to restoration of employment to discharged members of the armed forces:

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate,

"(2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service --

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay."

You will please note that under Paragraph (C) aforementioned the Federal Government does not mandate any state or political subdivision to restore the veterans to their former positions, but it says "to be the sense of the Congress" that such rights be restored. In other words, it is a declaration of national policy which is recommended for adoption by the states. We firmly believe that the recommendation of Congress should be followed by the State of Arizona as its own state policy. The State of Arizona in Chapter 29, 2nd Special Session Laws of 1944, expressly re-affirmed the federal policy by legislation. Section 1 of Chapter 29 provides in part as follows:

"Any appointive officer or employee of the State or a political subdivision thereof  
\* \* \* (who) having served in the armed forces during the time of war, shall, upon completion of his service be restored to the position held by him at the time of induction or

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"reporting for service, or to a position having a similar or other duties which he is qualified to discharge, and of like status and pay \* \* \*"

The Police Pension Act has been held constitutional and taxes may be levied to carry on the purpose of the Act. The preservation of order and the protection of lives and property are matters of state-wide or public concern. Luhrs vs. Phoenix, 52 Ariz. 438.

A person becomes a police officer with the expectations to receive protection of the Pension Act by which he is granted retirement upon completion of 20 years service. His right to retire at the end of 20 years is as much a part of the consideration for his services as is his monthly salary. It is a substantial right which the legislature has granted him in return for his faithful service.

If a member of the police force voluntarily takes a leave of absence without pay, under the rules and regulations of the City Civil Service, he reduces his retirement period to the extent of his time off on leave; but when his absence is not voluntary, when he leaves on the command of the Government of the United States--a command which he cannot disobey--we are of the opinion that he should not be penalized for serving his country in a war emergency. Both federal and state laws provide that the restoration must be as to seniority and status. The federal and state laws aforementioned were designed to avoid such penalties.

We shall now cite some authorities on the definition of the word "status."

"'Status' means a legal, personal relationship not temporary in its nature nor terminable at the mere will of the parties, with which third person and estate are concerned." RESTATEMENT, CONFLICT OF LAWS, Section 119.

"STATUS. Standing, state or condition. The legal, social relation and condition of parties. It has been said that, while the term undoubtedly implies relations, it is not a mere relation." 59 C. J. 337.

Applying such principle to our question, the restoration of the "status" means placing the officer in status quo ante: to afford the same legal rights, conditions and relations that he had at the time he left the department for military service; to continue to serve in the department uninterruptedly until he accumulated the required 20 years.

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We therefore hold that the time spent by a member of the Police Department in the military service of the United States during the current war should be included in, and credited to, his 20-year retirement period.

The Pension Act, in addition to a 20-year service, requires that the member contribute 2% of his pay "to be deducted from each salary warrant" which he receives for his services. A literal interpretation which you gave this Act logically leads to the conclusion that unless a man is in actual police service and receives pay therefor, the 2% contribution to the fund could not be made. The police pension statutes, however, must receive a liberal interpretation.

In the case of Donahue vs. Board of Trustees, 263 Ill. App. 568, in construing the Illinois Police Pension Act, which is similar to ours, said:

"This act was intended to provide for aged policemen who have served the city for a long time, including all police officers from Chief of Police to chauffeur in Police Department, and being adopted for a humane purpose should be given a liberal construction."

We believe that the deduction of the 2% from the officers' salary checks was intended to be merely a convenient administrative method of collecting these contributions to the fund, but not as the exclusive method of paying of same.

We noted that military service made it impossible for the policeman to pay his dues to the retirement fund strictly in the manner prescribed by statute. Nevertheless, before a member be entitled to share in the benefits of the pension fund, he must make his contribution as prescribed by law. Under the circumstances, to uphold his substantive rights under the Pension Act, the reinstated member may personally and directly make such payments. We base this ruling on the equitable rule of cy pres, or the doctrine of approximation, which is, as defined in Curran's Estate, 165 Atl. 842, that when a definite function or duty is to be performed and it cannot be done in exact conformity as prescribed, it may be performed with as close an approximate as is reasonably practicable. We are aware that the cy pres doctrine generally is a rule of construction in will and trust cases. We believe, however, that the present fact-situation is sufficiently analogous to justify the application of the rule.

In view of the foregoing reasons and authority, we are constrained to disagree with your opinion. We therefore hold that a member of the Police Department of the City of Tucson, upon returning from active military service and upon application for

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reemployment within sixty days from his separation from the armed forces, is now entitled to apply to and have included in his 20-year retirement period all of the time that he spent in the armed forces during the current war, provided, however, that he pay to the Police Retirement Fund a sum equivalent to 2% of the pay he would have received had he remained in police service during the time he spent in the armed forces. The percentage to be paid shall be based upon the amount of the salary he received from the city at the time he went into military service.

Yours very truly,

JOHN L. SULLIVAN  
Attorney General

HARRY O. JULIANI  
Chief Assistant  
Attorney General

HOJ:s

cc: Carl M. Hitt, Secy, Police Retirement Board, Tucson, Arizona.  
Arizona Daily Star, Tucson, Arizona.  
Secretary, Police Retirement Board, Phoenix, Arizona.  
Mr. Don Hayes, Chief of Police, Tucson, Arizona.